



August 2, 2002

Mr. Anthony S. Corbett
Winstead, Sechrest & Minick
100 Congress Avenue, Suite 800
Austin, Texas 78701

OR2002-4244

Dear Mr. Corbett:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 166791.

The Brushy Creek Municipal Utility District (the "district"), which you represent, received a request for (1) background information for a May 3, 2002 letter; (2) spreadsheets used in the computations included in the letter; (3) written specifications for the work discussed in the letter; (4) an outline of the expected deliverables and time frame for the completion of the project and the cost of the work; and (5) a description of the accounting code used for the project. You state that there are no documents responsive to categories one and three of the request. We note that the Public Information Act (the "Act") does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). Furthermore, you contend that the district is not required to create documentation in response to categories four and five of the request. We agree, that, to the extent the request would require the district to create new information, the district need not respond to the request. *A&T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 676 (Tex. 1995); *Fish v. Dallas Indep. Sch. Dist.*, 31 S.W.3d 678, 681 (Tex. App.--Eastland 2000, petition denied). Nevertheless, the district must make a good faith effort to relate a request to information held by it. Open Records Decision No. 87 (1975); see Gov't Code § 552.353 (providing penalties for failure to permit access to public information). Thus, you indicate that the district will make invoices available to the requestor. With respect to category two of the request, you state that the district has released an electronic version of the spreadsheet to the requestor. However, you contend that the district's consultant, who produced the spreadsheet, maintains another electronic version of the spreadsheet that includes the formulae used to derive the

data in the spreadsheet. You claim that the version of the spreadsheet held by the district's consultant is not public information and, therefore, need not be released to the requestor. We have also received arguments from the requestor in favor of the release of the spreadsheet containing the formulae. *See* Gov't Code §552.304. We have considered all of the submitted arguments.

The Act applies only to "public information," which is defined as:

information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Gov't Code § 552.002(a); *see id.* § 552.021. Thus, information is subject to the Act even if a governmental body does not physically possess the information, if the information is collected, assembled, or maintained for a governmental body and the governmental body owns the information or has a right of access to the information. You state that the district does not possess the version of the spreadsheet that includes the formulae. Rather, you state that the version of the spreadsheet with the formulae is held by the district's consultant. Generally, the Act applies to information collected or maintained by a consultant if: "(1) the information relates to the governmental body's official duties or business; (2) the consultant acts as agent of the governmental body in collecting the information; and (3) the governmental body has or is entitled to access to the information." *Open Records Decision Nos. 621 at 5 n.8 (1993), 462 at 4 (1987).*

The requestor has provided this office with a copy of the contract for services between the district and the consultant. Under the contract, the consultant agrees to provide various services relating to the construction of a water treatment plant and other projects, including providing estimates for the cost of the projects. Under the contract, the consultant is afforded "the full power and authority to select the means, methods and manner of performing the Services for District." The contract does not provide the district with access to information concerning the means used to perform the services. Specifically, the district contends that it does not have a right to access the electronic version of the spreadsheet with the formulae. Based on our review of the submitted information, we find that the consultant was acting independently of the district in determining the formulae used to derive the information in the spreadsheet. Furthermore, the district does not have a right of access to the information. Therefore, the information is not "public information" and need not be released to the requestor. *See Open Records Decision Nos. 621 at 5 n.8 (1993), 462 at 4 (1987); see also* *Open Records Decision No. 585 at 2 (1991).*

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

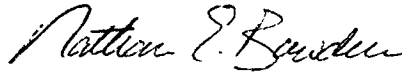
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, reading "Nathan E. Bowden".

Nathan E. Bowden
Assistant Attorney General
Open Records Division

NEB/sdk

Ref: ID# 166791

c: Mr. John C. McLemore
8400 Cornerwood Drive
Austin, Texas 78717